Supreme Court, U.S.
FILED

(1) No. 95-562 OCT 3 - 1995

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

WALTER P. MAXWELL,

Petitioner,

V.

E-SYSTEMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

John M. Bredehoft
Counsel of Record
Elaine C. Bredehoft
Linda M. Jackson
Of Counsel

CHARLSON & BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 22090
(703) 318-6800

Counsel for Petitioner - Walter P. Maxwell

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does proof of a prima facie case of discrimination under the Age Discrimination In Employment Act under the judicially-created proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) require a demonstration that the claimant has been replaced by someone under the age of 40 years, as opposed to proof of replacement by a significantly younger individual?

2. May the factual testimony of an employment discrimination plaintiff, standing alone, suffice to prove that an employer's asserted rationale for adverse action is untrue, and a mere pretext for discrimination, sufficient to defeat a motion for summary judgment?

3. Does an employer's stated intention to select a demoted plaintiff's replacement based, at least in part, on the younger age of the replacement selected constitute evidence of discriminatory intent, sufficient to defeat a motion for summary judgment?

PARTIES TO THE PROCEEDING

The names of all of the parties to this proceeding appear in the caption of the case.

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OPINIONS DELIVERED IN THE CASE

The Opinion of the Court of Appeals is unreported, save as a table case. Maxwell v. E-Systems, Inc., 60 F.3d 823 (4th Cir. 1995). The opinion is reported unofficially on the LEXIS system, at 1995 U.S.App.LEXIS 16457 (4th Cir. July 5, 1995).

The Memorandum Opinion of the district court is not reported. Maxwell v. E-Systems, Inc., C.A. No. 93-1518-A (E.D. Va. June 13, 1994).

STATEMENT OF JURISDICTION IN THIS COURT

The opinion of the Court of Appeals in this matter was issued on July 5, 1995. No petition for rehearing, or motion for an extension of time for filing a Petition for Certiorari, has been filed.

This Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1). The Order of the district court granting summary judgment was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES INVOLVED IN THE CASE

This Petition involves the proper interpretation of the Age Discrimination In Employment Act of 1967, 29 U.S.C. §§ 621 et seq., and in particular of Section 3(a)(1) of that Act, which provides:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 632(a)(1).

STATEMENT OF THE CASE

This civil action was brought by plaintiff Walter Maxwell against his employer, E-Systems, Inc. ("E-Systems"), under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (the "ADEA").[1] The district court had jurisdiction of Mr. Maxwell's claims under the ADEA in the first instance pursuant to 29 U.S.C. § 626 c)(1), 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

Mr. Maxwell is 63 years old. At the time of the events giving rise to this litigation, Mr. Maxwell had been employed by E-Systems for twenty-two years. Mr. Maxwell was a supervisor, and a field site supervisor for a classified government project code-named CARDINAL.

After an incident involving the removal of a failed "test unit" device at the CARDINAL field site in early 1993, in which E-Systems contends Mr. Maxwell damaged the failed test unit, Mr. Maxwell was re-assigned, demoted, and suffered a $10,000 per year loss in salary due to the loss of his supervisory position.

Mr. Maxwell's supervisory responsibilities were assumed by Mr. Frank Ascensio, who at the time was

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[1] A separate claim under the employment discrimination provisions of the Americans With Disabilities Act of 1990 was asserted, but is not the subject of this Petition.

32 years of age. Mr. Ascensio had been hired by E-Systems before the incident involving the test unit, with the express intention of replacing Mr. Maxwell. Mr. Maxwell's field responsibilities were assumed by Mr. Larry Coughenour, who was 53 years of age.

After the close of discovery, the United States District Court for the Eastern District of Virginia, Alexandria Division, Hon. Claude M. Hilton presiding, granted summary judgment in favor of E-Systems and against Mr. Maxwell.[2]

The district judge held that Mr. Maxwell was not able to state a prima facie case of discrimination under the judicially-created proof system of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). The sole rationale for the district court's decision was the assumption of part of Mr. Maxwell's duties -- although not all of those duties -- by Mr. Coughenour, who was over the age of 40 although substantially younger than Mr. Maxwell. As the district court reasoned, Mr. Maxwell could not prove that he was replaced in his former position by someone outside the protected class under the ADEA, and therefor had not demonstrated a prima

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[2]The Memorandum Opinion of the district court, issued on June 13, 1994 after the filing of the Notice Of Appeal, is reproduced in its entirety in the Appendix.

facie case. Memorandum Opinion at 5.

The Court of Appeals affirmed the decision of the district court, but did so on grounds not discussed or relied on by the district court.[3] Rather, the Court of Appeals found that Mr. Maxwell did not produce sufficient evidence "as would permit a reasonable person to conclude that the units were not seriously damaged during the retrievals or that Maxwell was not responsible." Opinion at 7.

Mr. Maxwell testified that any "damage" to the already-inoperative test unit was inconsistent with that damage being caused by Mr. Maxwell's operation. Mr. Maxwell also testified that the unidentified customer was not upset at the incident. The company's report of the incident, prepared by Mr. Maxwell's supervisor, concluded that further disciplinary action was inappropriate. Nonetheless, the Court of Appeals held that "Maxwell's unsupported allegations are not sufficient to create a genuine issue in regard to what caused the damage [to the CARDINAL] test unit, what damage was caused, and how the customer reacted." Opinion at 7.

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[3]While the opinion of the Court of Appeals states that the "district court granted summary judgment to E-Systems on alternative bases," Opinion at 4, a brief review of the district court's Memorandum Opinion discloses that this is plainly incorrect.

ARGUMENT

I. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT PROOF OF A PRIMA FACIE AGE DISCRIMINATION CASE USING THE McDONNELL DOUGLAS PARADIGM REQUIRES PROOF THAT THE CLAIMANT HAS BEEN REPLACED BY SOMEONE UNDER THE AGE OF FORTY, RATHER THAN REPLACEMENT BY A SUBSTANTIALLY YOUNGER INDIVIDUAL

In contrast to the law of every other Circuit, the Fourth Circuit stands alone in requiring that, as a matter of law, proof of a prima facie case of age discrimination under the judicially-created McDonnell Douglas/Burdine paradigm[4] requires a demonstration that the claimant has been replaced by an individual under the age of 40. It would be appropriate for this Court to grant the Petition for Certiorari to resolve this conflict on this important issue between the Court of Appeals of the Fourth Circuit and the several other Court of Appeals. S. Ct. Rule 10.1(a).

It was error for the district court to grant the motion for summary judgment

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[4]Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). See St. Mary's Honor Center v. Hicks, ___ U.S. ___, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993).

on this ground, although the district court's determination is consistent with the law of the Fourth Circuit. Judge Hilton held:

> The parties do not dispute the first three elements [of the prima facie case]. However, Maxwell is unable to meet the fourth element. . . . The fourth element of the test is not satisfied if the plaintiff was replaced by an individual over 40 years old, even if that individual is younger than the plaintiff.

Memorandum Opinion at 5.

The earliest decision from the Court of Appeals for the Fourth Circuit on this issue correctly characterized the law on this issue, albeit in dictum. In Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982), the Court of Appeals wrote:

> The trial judge intimated some concern that perhaps no violation was established as a matter of law because the evidence showed that the claimant was not replaced by a person outside the protected age group. Defendant conceded on oral argument that on current authority this does not constitute an independent basis for the judgment. . . . We agree that this is not an essential legal element of the

ADEA claim. . . .

681 F.2d at 237-38 n.5. Rather, as that earlier Fourth Circuit decision framed the issue:

> [a]n ADEA claim involving replacement by another does not require as a matter of law proof that the other was outside the protected age group. But absolute and relative ages of the claimant and his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible. We agree with the First Circuit that:
>
> Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or by a 39 year old outside it.

681 F.2d at 242-43 n.13, quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979).

The discussion in Lovelace accurately characterized the law, but the Fourth Circuit soon abandoned this view.

In a series of cases in the early 1990s, the Court of Appeals erroneously formulated the fourth element of the McDonnell Douglas/Burdine prima facie

case in ADEA actions as the replacement of the plaintiff by someone outside of the protected class, i.e., someone under age 40.[5] In none of these cases did the Court of Appeals discuss the rationale for this formulation of the prima facie case, or indeed even acknowledge the Court's shift from its earlier conclusion in Lovelace. It was not until June of this year, shortly before the decision in Mr. Maxwell's case was announced, that the Court of Appeals decided O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995), petition for cert. filed (August 29, 1995), in which the theory that led to the dismissal of Mr. Maxwell's claim was articulated and explained by the Fourth Circuit. In Consolidated Coin, Senior Circuit Judge Butzner wrote separately to emphasize that the Fourth Circuit's formulation of such an "absolute requirement . . . has no justification in law or policy. . . . The Act contains no language permitting employers to favor a younger employee over an older one on the basis of age simply because the younger employee is within the protected age group."

The Circuits are clearly divided on this issue, with the Fourth Circuit standing alone. See, e.g., Freeman v. Package Machinery Corp., 865 F.2d 1331 1335 n.2 (1st Cir. 1988); Loeb v. Textron, Inc., 600 F.2d 1003, 1319 n.9

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[5]See, e.g., Sailor v. Hubbell, Inc., 4 F.3d 323 (4th Cir. 1993); Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993).

(1st Cir. 1979); Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984); Maxfield v. Sinclair International, 766 F.2d 788, 792-93 (3d Cir. 1985), cert. denied, 474 U.S. 1057, 88 L.Ed.2d 773, 106 S.Ct. 796 (1986); Blum v. Witco Chemical Corp., 829 F.2d 367, 372 (3d Cir. 1987); McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988); Barnes v. Gencorp, Inc., 896 F.2d 1457, 1466 (6th Cir.), cert. denied, 498 U.S. 878, 112 L.Ed.2d 171, 111 S.Ct. 211 (1990);[6] Kralman v. Illinois Department of Veterans' Affairs, 23 F.3d 150, 154-55 (7th Cir.), cert. denied, ___ U.S. ___, 130 L.Ed.2d 213, 115 S.Ct. 359 (1994); Reinhart v. City of Independence, 35 F.3d 1263, 1265-66 (8th Cir. 1994), cert. denied, ___ U.S. ___, 131 L.Ed.2d 744, 115 S.Ct. 1822 (1995); Douglas v. Anderson, 656 F.2d 528, 532-33 (9th Cir. 1981); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1444 (11th Cir.), cert. denied, 474 U.S. 1006, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985); Carter v. City of Miami, 870 F.2d 578, 582-83 (11th Cir. 1989); Ware v. Howard University, Inc., 816 F. Supp. 737, 750 (D.D.C. 1993); Miller v. Lyng, 660 F. Supp. 1375, 1378 n.2 (D.D.C. 1987); Endres v. Helms,

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[6]But see LaPointe v. United Autoworkers Local 600, 8 F.3d 376 (6th Cir. 1993) (ADEA plaintiff could not state a prima facie case unless the plaintiff was replaced by someone under 40).

617 F. Supp. 1260, 1266-67 (D.D.C. 1985).

The interpretative regulations issued by the U.S. Equal Employment Opportunity Commission also note that it is unlawful for an employer in any way to give "preference because of age between individuals 40 and over." 29 C.F.R. § 1625.2(a) (emphasis added). "Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age. . . ." Id. This interpretation is entitled to deference. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

This Court should issue a writ of certiorari in this case to resolve this conflict among the Circuit Courts of Appeals.

II. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT NO REASONABLE JURY COULD HAVE CREDITED THE FACTUAL TESTIMONY OF MR. MAXWELL AS TO THE PREDICATE INCIDENT WHICH LED TO HIS DEMOTION

Although the district court did not address the issue, the Court of Appeals held that summary judgment for E-Systems was appropriate because "Maxwell's unsupported allegations" were insufficient to support the inference that the damage to the test unit did not occur as claimed by E-Systems. As the Court of Appeals framed the issue, "Mere

speculation or the building of one inference upon another" does not create a genuine issue of fact. Opinion at 7. This was error.

This Court is justifiably reluctant to grant certiorari to correct rulings based on factual errors in the lower courts. However, in this case, question at hand is a legal one: what quantum of evidence is necessary to survive summary judgment in an employment discrimination case, where the key issues are motive and intent and where direct evidence of discriminatory animus is almost never present?

This is precisely the issue which so concerned the four dissenting members of this Court in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), where Justice Souter warned of "summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." 113 S.Ct. at 2763.

While the Court of Appeals derogated Mr. Maxwell's "unsupported allegations" which countered E-Systems' contentions, even uncorroborated "allegations" by a party are -- if they take the form, as they did in this case, of sworn and competent testimony as to factual observations -- sufficient to withstand summary judgment. A party may build his case on his own testimony. Mr. Maxwell did not merely "speculate" as to the

issues surrounding E-Systems' offered justification for his demotion. Rather, he offered highly probative sworn testimony and other direct evidence:

- That E-Systems' customer agreed that Mr. Maxwell had been doing the right thing, was not upset, and appeared sympathetic.[7]

This sworn evidence directly controverted the conclusion of the Court of Appeals that Mr. Maxwell could not "create a genuine issue in regard to . . . how the customer reacted."

- That after the January 1993 incident, E-Systems was awarded a two-year extension of the contract by this customer.[8] Again, this evidence directly controverted the conclusion of the Court of Appeals that Mr. Maxwell could not "create a genuine issue in regard to . . . how the customer reacted."

- That several witnesses testified to E-Systems' intention to replace Mr. Maxwell with the 32-year-old Mr. Ascensio two years prior to the "test unit" incident, and than an abortive attempt to effect the replacement was

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[7]Appendix Three, ¶4(a).

[8]Appendix Three, ¶ 4(b).

abandoned when the customer vehemently complained.[9]

- That none of the other E-Systems employees involved in the incident, or in other similar test unit installation failures, had ever been disciplined.

- That both Mr. Maxwell and his supervisor, John Hale, believed that any damage done to the test unit was minor, and that the incident neither caused substantial damage nor significantly obscured the pre-existing damage which required removal of the test unit in the first place.[10]

- That, despite the Court of Appeals' conclusion that Mr. Maxwell was at fault for not using proper procedures, the E-Systems' incident memorandum concluded that "[p]roper procedures were being used."[11]

The lower courts in this case simply misconceived the quantum of evidence sufficient to permit this case to be

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[9]Appendix Three, ¶ 5.

[10]Appendix Three, ¶ 2.

[11]Appendix Three, ¶ 2.

tried to a jury. In St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), this Court held that a Title VII plaintiff is not entitled to judgment as a matter of law merely by proving a defendant's proffered explanation is pretextual. However, this Court was careful to note that evidence of pretext may also provide evidence from which a finder of fact may infer discriminatory intent:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals [below] was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.'

113 S.Ct. at 2749. On this record, it was error to award summary judgment to E-Systems on this issue.

III. THE LOWER COURT ERRONEOUSLY HELD THAT THE COMPANY'S SELECTION OF MR. MAXWELL'S REPLACEMENT BASED ON THE REPLACEMENT'S AGE COULD NOT CONSTITUTE EVIDENCE OF INTENT TO DISCRIMINATE ON THE BASIS OF AGE

Mr. Maxwell offered direct evidence that age motivated E-Systems in making employment decisions relating to his position. In deciding to make the younger Mr. Coughenour site leader, E-Systems considered but rejected the alternative of replacing Mr. Maxwell with a more experienced, albeit older, employee, Stan Scalsky, even though (as Mr. Maxwell testified) Mr. Scalsky was "much more qualified" than Mr. Coughenour.

Mr. Scalsky was rejected as Mr. Maxwell's replacement by E-Systems because of Scalsky's age. Both Mr. Maxwell and Mr. Maxwell's supervisor, Mr. Hale, testified to this effect at deposition.[12]

It also bears noting that the memorandum prepared by Mr. Maxwell's supervisor, John Hale, expressly counseled against additional disciplinary action because "Walt is, frankly speaking, in the 'retirement age category.' . . . Further personnel action may 'encourage' Walt to retire which, in the writer's opinion, is

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[12]Appendix Three, ¶ 3.

neither in the best interest of the CARDINAL O&M program, nor is it in the best interest of our Government Customer."[13] Nonetheless, after receiving this warning, E-Systems imposed further discipline on Mr. Maxwell.

The Court of Appeals dismissed this evidence of age-related motivation on the part of E-Systems with the observation that it "amounts to no more than [Maxwell's] subjective belief . . . of discriminatory intent." Opinion at 8. This was error; taken together, Mr. Maxwell presented sufficient evidence of direct, age-related animus to survive summary judgment.

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[13]Appendix Three, ¶ 2.

CONCLUSION

Petitioner Walter Maxwell respectfully requests that his Petition be granted, and that a writ of certiorari issue in this cause.

October 3, 1995
Respectfully submitted,

John M. Bredehoft
COUNSEL OF RECORD

Elaine C. Bredehoft
Linda M. Jackson
Of Counsel

CHARLSON & BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 22090
(703) 318-6800

Counsel for Petitioner
Walter P. Maxwell

APPENDIX

1 - The Opinion of the United States Court of Appeals for the Fourth Circuit decided July 5, 1995 ..... 1A

2 - The Memorandum Opinion and Order of the United States District Court entered June 13, 1994 ..... 9A

3 - Excerpts from Record on Appeal 17A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WALTER P. MAXWELL,
Plaintiff-Appellant,

v.

E-SYSTEMS, INCORPORATED, MELPAR DIVISION,
Defendant-Appellee.

No. 94-1785

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-93-1518-A)

Argued: May 1, 1995

Decided: July 5, 1995

Before HALL, WILKINSON, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Michael Bredehoft, CHARLSON & BREDEHOFT, P.C., Fairfax, Virginia, for Appellant. Paul Charles Skelly, HOGAN & HARTSON, L.L.P., McLean, Virginia, for Appellee. **ON BRIEF:** Elaine C. Bredehoft, CHARLSON & BREDEHOFT, P.C., Fairfax, Virginia, for Appellant. William P. Flanagan, Amy Folsom Kett, HOGAN & HARTSON, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Walter P. Maxwell appeals the summary judgment granted to his employer, E-Systems, Inc., in Maxwell's age and disability discrimination action. We affirm.

I

E-Systems produces electronics systems and related products. Maxwell has been employed as an engineer with the Melpar division of the company since 1972. Melpar deals largely in defense-related work for the government. Prior to his demotion, Maxwell had been a supervising engineer and, since 1985, the site leader on the CARDINAL project. In this latter role, which was unofficial and for which he received no additional compensation, he was responsible for operations at a customer's site where testing of some sort of equipment was being performed.[1]

Maxwell was in charge of the retrieval of a "test unit" in May, 1992. The plan developed by Maxwell and his supervisors was to use automated equipment to approach the unit and then switch to hand tools to retrieve it. Maxwell, however, used automated equipment throughout the process and, according to E-Systems, the unit was damaged and critical test data was lost. Maxwell was orally reprimanded and warned.

In January, 1993, Maxwell was in charge of another retrieval effort. Although his supervisor had advised him to use hand tools throughout the process, Maxwell instead used automated equipment. When Maxwell briefly turned away from the coworker who had been

[1]The CARDINAL project was classified, so the government customer and the nature of the equipment and testing have not been revealed.

relaying hand signals to guide him, the retrieval machine contacted the test unit. This accident was termed "a disaster" by E-Systems. As a consequence, Maxwell was demoted from his supervisory engineer position, and his annual salary was cut by $10,000. His site leader duties were reassigned to 53-year-old Larry Coughenour, and his supervisory duties were assumed by 32-year-old Frank Asencio. Maxwell, who had had serious heart problems in the late 1980s, was 62 years old at the time. In November, 1993, Maxwell filed this action, alleging that his age and/or a perceived disability were motivating factors in the demotion decision.

II

To recover under the Age Discrimination in Employment Act [ADEA],[2] a plaintiff must prove that, "but for the employer's motive to discriminate against the employee because of the employee's age, the employee would not have suffered the [unfavorable employment] action." *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993). A plaintiff may prove his case by either direct or indirect evidence or by using the proof scheme originally formulated for Title VII cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982) (adapting the *McDonnell* Douglas scheme for ADEA cases). Maxwell's case proceeded along this judicially created proof scheme.

In the context of an age discrimination action, the modified *McDonnell Douglas* scheme places the initial burden of production on the plaintiff to make out a *prima facie* case of illegal discrimination by establishing[3] that (1) the employee was over the age of 40; (2) he suffered an unfavorable employment action; (3) he was at the time meeting his employer's legitimate expectations; and (4) he was

[2]29 U.S.C. § 621 *et seq.*

[3]We have recently described this initial burden as entailing "pro[of] of a set of facts which would enable the fact-finder to conclude with reasonable probability that *in the absence of any further explanation*, the adverse employment action was the product of age discrimination." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (emphasis in original).

replaced by someone outside the protected class (someone under the age of 40). *EEOC v. Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). Establishment of a *prima facie* case raises a presumption of discriminatory motive, and the burden of production shifts to the defendant to advance a legitimate non-discriminatory reason for the employment action. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993). Once this burden is met by the defendant, the presumption vanishes, and the plaintiff is left with the task of meeting his burden of persuasion on the ultimate question: Did the defendant illegally discriminate against the plaintiff? *Id.*[4]

The district court granted summary judgment to E-Systems on alternative bases. First, the district court ruled that, for purposes of the *McDonnell Douglas* scheme, Maxwell had been replaced by Coughenour, who was not outside the protected class, and not by Asencio; therefore, the fourth factor of the *prima facie* case had not been met. Alternatively, the court held that E-Systems' legitimate nondiscriminatory reason for the demotion had not been countered by evidence of pretext and that Maxwell had failed to produce any evidence that his employer's decision was fueled by discriminatory motives. We affirm the judgment of the district court.

---

[4]Maxwell also claims that the company's action was motivated by its perception that Maxwell was disabled as a result of a heart problem. The *McDonnell Douglas* scheme also applies to Maxwell's claim under the Americans with Disabilities Act [ADA]. *Ennis v. Nat'l Assoc. of Business and Educ. Radio, Inc.*, No. 94-1585, slip op. (4th Cir. May 15, 1995). We have recently held that the fourth factor in the establishment of a *prima facie* ADA case is that the adverse employment decision "occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Id.* at 6. However, the only evidence of disability-based discrimination is the company's requirement that he be cleared by his physician before returning to his physically demanding duties at the CARDINAL site. The most favorable inference that Maxwell might squeeze out of this evidence is that E-Systems was concerned about its liability, and even this does not implicate discriminatory intent. The most likely inference, however, is that the company acted out of concern for its employee's well being. The summary judgment on this claim is affirmed for the reasons set forth in the district court's memorandum opinion. *Maxwell v. E-Systems, Inc.*, C/A 93-1518-A (E.D. Va) (June 13, 1994).

III

Our review of the judgment is *de novo*, and we will affirm only if the record shows no genuine issue of material fact. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 115 S. Ct. 67 and 68 (1994). The losing party must point to specific evidence that establishes a triable dispute; mere allegations are insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We view the evidence in the light most favorable to the non-movant. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

A

The core of Maxwell's theory of ADEA liability is that E-Systems hired Asencio in 1990 with a view to replacing Maxwell and that the test-unit incidents were just a cover for promoting Asencio over him. There should be no question but that damage to the test units, if caused by Maxwell, would constitute a legitimate reason for the demotion. The question is whether Maxwell has probative evidence which, if believed by a jury, would be enough to find that the company's explanation for its action was a pretext for discrimination.

In order to proceed beyond the summary judgment stage, Maxwell had to either adduce admissible evidence that (1) the test-unit incidents did not occur as claimed by E-Systems, or (2) if the incidents did occur as claimed, they were merely a cover for discrimination. If there was enough evidence to raise a genuine question regarding whether the incidents occurred, then the stated reasons for the demotion could be found to have been pretextual, and from this, in conjunction with the *prima facie* case, a factfinder could "infer the ultimate fact of discrimination." *St. Mary's Honor Ctr.*, 113 S. Ct. at 2749. Even in the absence of sufficient evidence to raise a genuine issue about the facts underlying the stated reason for the demotion, Maxwell could still survive a motion for summary judgment by coming forth with evidence that the proffered reason, however facially valid, was merely a cover for discrimination. *See id.* at 2747-48. Our review of the record convinces us that Maxwell fails on both points.

B

As a preliminary matter, we first address Maxwell's claim that his inability to obtain some evidence in discovery should alter how we

approach our review of the judgment. Because of CARDINAL's classified status, Maxwell was unable to discover and use information such as the identity of the CARDINAL customer, the nature of the "test unit" and what its retrieval entailed, and the identity of the customer's personnel present at the retrieval attempts. He does not contend that he should have been given access to this information, and he has never sought to compel its disclosure. Instead, he suggests that E-Systems should be precluded from relying on the claim of "legitimate business justification" for the demotion because his ability to counter the company's defense is so dependent on undiscoverable information.

Maxwell's dilemma is the "regrettable consequence" that flows from the judicially recognized privilege for state secrets; "one of the parties' litigation position suffers from its inability to discover and present all of the facts it might seek." *In re Under Seal*, 945 F.2d 1285, 1289 (4th Cir. 1991). The inability of Maxwell to get all that he would have preferred is not grounds for changing the other rules of the game. Very simply, he has to do with what he has.

C

We turn, then, to what the record shows with regard to the stated reason for the demotion. According to Maxwell's supervisor, Jack Jeanes, the May, 1992, removal "destroyed" the test unit and was a serious blow to the company's reputation, and, after the "disast[rous]" January, 1993, accident, something had to be done to mollify the customer. Maxwell argues that the evidence is such at this stage of the proceedings that there is at least a genuine issue as to whether he was responsible for the damage to the units or even whether the units were seriously damaged.

Company memoranda and deposition testimony from company officials amply buttress E-Systems' contention that Maxwell's demotion and reassignment to the central office were primarily done for reasons of "customer relations." E-Systems maintains that the government client was extremely upset with the damage to the test units and that the demotion was necessary to regain the client's confidence. Maxwell merely points to his own deposition testimony that the cus-

tomer representative was not upset "and appeared sympathetic" when informed of the January 1993 incident.[5]

It is undisputed that Maxwell was in charge, that he used automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident. Maxwell's unsupported allegations are not sufficient to create a genuine issue in regard to what caused the damage, what damage was caused, and how the customer reacted. "Mere speculation or the building of one inference upon another" does not create a genuine issue. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Maxwell has not come forth with enough evidence as would permit a reasonable person to conclude that the units were not seriously damaged during the retrievals or that Maxwell was not responsible.

D

We turn, finally, to Maxwell's claim that the stated reasons were nevertheless not the true reasons for the demotion. Maxwell maintains that summary judgment was inappropriate because he has direct evidence of discriminatory intent. When Maxwell was relieved of his site leader responsibilities, he was replaced by 53-year-old Coughenour rather than the more experienced (and 60-year-old) Scalsky. Maxwell argues that this decision was based on Scalsky's age; one of the company supervisors allegedly commented on Scalsky's age and how it would be nice to have someone in the site-leader position with a little more longevity. This comment constitutes the sum total of direct evidence of discrimination toward Maxwell.

Recognition of the effects of age and longevity of employees on long-range company planning is not discriminatory. E-Systems has some 2200 employees, and it only makes sense to make plans to replace older employees. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994) (employer's "statement that 'there comes a time when we have to make way for younger people' ... creates no inference of age bias [and] reflects no more than a fact of

[5]Appellant's opening brief at 38.

life ...."). Maxwell's evidence of discriminatory intent amounts to no more than his subjective belief, and such evidence, without more, is an insufficient basis for relief in the face of proof of nondiscriminatory reasons for the employment action. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

We hold that Maxwell failed to produce enough evidence to create a genuine issue as to the causes and magnitude of the two retrieval accidents and, further, that he failed to produce sufficient evidence of pretext on E-Systems' part. Accordingly, we affirm the judgment of the district court.

AFFIRMED

APPENDIX PART TWO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

WALTER P. MAXWELL,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 93-1518-A
	)	
	)	
E-SYSTEMS, INC.,	)	
	)	
Defendant.	)	

By: Hon. Claude M. Hilton
United States District Judge

This case came before the Court on defendant's Motion for Summary Judgment. Plaintiff Walter P. Maxwell ("Maxwell") claims that the defendant E-Systems, Inc. ("E-Systems") discriminated against him in violation of the Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12001 et seq., (the "ADA") and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-34 (the "ADEA"). Jurisdiction is proper for the ADA claim pursuant to 28 U.S.C. §§ 1331 and 1343(a), as well as 42 U.S.C. § 12117(a)> Jurisdiction is proper for the ADEA claims under 28 U.S.C. §§1331 and 1343(a) and 29 U.S.C. § 626(c)(1).

Maxwell began working for E-Systems in 1958, left to pursue other opportunities, returned to the company's Melpar Division in 1971, and has remained there. The

division's principal work is contracting for federal governmental agencies, mostly in defense-related business. At the time of the events giving rise to this dispute, he was a supervising engineer on the company's CARDINAL Operations & Management ("O&M") Program, which is a classified.

Maxwell is now 62 years old. In February 1989, he was diagnosed with congestive heart failure, and in May 1989, he suffered cardiac arrest. In June 1989, doctors installed a defribulator into his chest. Maxwell returned to work full time in October 1989, and except for a short time during late 1991 and early 1992 when he had cancer surgeries, he has worked there without significant interruption on account of his health.

One of Maxwell's responsibilities as supervisor was to be a "site leader" when employees traveled from the Melpar Division's offices in Northern Virginia to the customer's site to perform various tasks required under Melpar's contract with the government. In May 1992 and January 1993, Maxwell was involved in two incidents that led to damage to government-owned test units, or components that were manufactured by E-Systems and installed at the customer site for testing.

In May 1992, Maxwell was site leader in an operation to retrieve a test unit. He selected automated equipment to conduct the removal, and superiors warned him to be careful in using that equipment. The unit was severely damaged upon its removal, and E-Systems blames Maxwell, maintaining that the removal equipment caused the damage. Jack Jeans, the Director of Special Programs, and Bobby Stilwell, Engineering Manager, determined that the damage was a direct result of "a negligent accident."

In January 1993, Maxwell was again site leader for

a removal operation. He was advised to use hand and not automated removal equipment and to be careful not to damage the equipment. Maxwell again chose to use automated removal equipment and worked with a "watcher" who communicated with him by hand signals. Maxwell admits that he looked away from the watcher and did not see his signals to stop and that the removal equipment made contact with part of the test unit. Following the accident, John Hale, Maxwell's supervisor, prepared a report indicating the Maxwell accidently damaged a piece of program equipment at a remote field site using proper procedures. E-Systems claims that as a result of these accidents, it lost a substantial portion of its business from the government customer.

While the company could have fired Maxwell for the damage to the equipment and loss of business, it chose to demote him and strip him of his site leader status. The company reassigned the site leader responsibilities to Larry Coughenour, who was at the time 53 years old and had no known health problems. Maxwell maintains that E-Systems declined to select another person, Stan Scalsky, who is of similar age to Maxwell, because of his age and artificial bladder. There is no dispute that when considering Scalsky, the older of two candidates for the responsibility, Jeans expressed concern about Scalsky's remaining time with the company. The company delegated Maxwell's supervisory responsibilities to Frank Asencio, 32.

Maxwell complains that the company had previously expressed concern about his physical condition and age. Following his heart problems, the company prepared a detailed task description of his job responsibilities. The company explains that the work was done in order to determine the exposure faced by placing the plaintiff on site far away from medical help.

Grants of summary judgment motions are warranted if the pleadings, answers to interrogatories, admissions and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines materiality. That is, only those facts that might be outcome-determinative under the current law are material. A "genuine" issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To prevail on a claim the E-Systems discriminated against him in violation of the ADA and the ADEA, Maxwell must prove that age and disability were "determining factor[s]" in the decision to terminate him. See, e.g., Tuck v. Henkel Corp., 973 F. 2d 371, 374 (4th Cir. 1992), cert. denied, 113 S.Ct. 1276 (1993). In other words, he must show that but for E-Systems' alleged motive to discriminate against him because of his disability and age, Maxwell "would not have suffered the action." Id.

There are two ways Maxwell may meet his burden of proving discriminatory intent. Under the scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), once he proves all of the elements of a prima facia case of discrimination, the burden shifts to the defendant to articulate a legitimate non-discriminatory explanation. See Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314-15 (4th Cir. 1993); Fink v. Western Elec. Co., 708 F.2d 909 (4th Cir. 1983) (adopting McDonnell Douglas scheme for use in ADEA cases). Once the defendant articulates a non-discriminatory explanation, the presumption of discrimination created by the prima facia case "drops from the case," and the plaintiff bears the ultimate burden to

prove both that the defendant's reasons were pretextual and that the adverse employment action was the result of intentional discrimination. See St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993); Mitchell, 12 F.3d at 1315.

In order to establish a prima facia case, Maxwell must show that: (1) he was protected by the ADEA; (2) he was demoted; (3) at the time he was demoted he was performing his job at a level that met his employer's legitimate expectations; and (4) "following his demotion, he was replaced by an individual of comparable qualifications outside the protected class." Mitchell v. Data Gen. Corp., 12 F.3d at 1315. The parties do not dispute the first three elements. However, Maxwell is unable to meet the fourth element of the Mitchell test.

The fourth element of the test is not satisfied if the plaintiff was replaced by an individual over 40 years old, even if that individual is younger than the plaintiff. E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 943-44 (4th Cir. 1992). After his demotion, Maxwell's duties were divided among two people, one of whom, Larry Coughenhour, was 53 at the time of replacement. Therefore, even if Maxwell was "replaced,"[1] Maxwell is unable to meet his burden to establish a prima facia case.

---

[1]Although this Court declines to rule on the point, there is some question as to whether Maxwell was replaced when two current employees took over his responsibilities. Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir.)("[A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work").

Maxwell also cannot directly or indirectly prove that E-Systems demoted him on account of his age. He has no direct evidence that the individuals who stripped him of his site leadership responsibilities - particularly Jeans - acted towards him with discriminatory intent. Nor does he have any direct evidence that management personnel who ordered the salary reduction were biased against him or anyone else account of his age. Failure at the summary judgment stage to produce evidence that the defendant's proffered reasons for the adverse action are merely pretextual or that the defendant was animated by discriminatory motive entitles the defendant to judgment as a matter of law. St. Mary's Honor Center, 113 S.Ct. 2742, 2747 (1993) (plaintiff always bears the burden of proof by a preponderance of the evidence that his employer engaged in intentional discrimination).

Maxwell also cannot prevail on his claim that he was discriminated against because of his disability. In order to succeed on his "perceived disability" claim, the plaintiff must show (1) that he did not have a substantially limiting impairment, and (2) that the employer perceived the impairment as constituting a substantially limiting impairment limiting one or more of his major life activities. E.E.O.C. Regulations, 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, Department of Mental Health, Retardation & Hosps., 10 F.3d 17 (1st Cir. 1993) (analyzing a perceived disability claim under the analogous Rehabilitation Act).

Even if Maxwell can establish that his defribulator and heart condition is an impairment under the ADA, he has no evidence from which a reasonable jury could conclude that E-Systems believed or perceived that the heart condition was a substantially limiting impairment affecting his major life activities. In any event, Maxwell has no evidence that the company perceived that his heart

condition affected his abilities to perform his job functions. The only evidence of discrimination - management's inquiry into his health in late 1991 and early 1992 in an effort to assure itself that Maxwell could perform his job duties without restriction - is not probative on either side of these two issues. And E-Systems dropped any inquiry into Maxwell's health as soon as Maxwell's cardiologist certified that he could perform his job responsibilities. Plaintiff concedes that there is no evidence that Jeanes requested the cardiologist certification for any other reason than the one Jeanes gave. He also admits that following the request for the doctor's certification in early 1992, E-Systems let him continue to work without interruption - operating heavy equipment on a multi-million dollar project - at the customer's site for another year, and that he was removed from the site only after he destroyed government property. Because he cannot produce evidence that E-Systems discriminated against him on the basis of a perceived disability, Maxwell's ADA claim must fail.

An appropriate Order shall issue.

ENTERED June 13, 1994.

/S/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

WALTER P. MAXWELL,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 93-1518-A
	)	
	)	
E-SYSTEMS, INC.,	)	
	)	
Defendant.	)	

By: Hon. Claude M. Hilton
United States District Judge

ORDER

This case came before the Court on defendant's Motion for Summary Judgment, and for reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendant's Motion is GRANTED, and this case is DISMISSED.

ENTERED June 13, 1994.

/S/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

APPENDIX PART THREE

EXCERPTS OF RECORD ON APPEAL

1. Deposition excerpts relating to 1992 incident.

a. Deposition of E-Systems Director John Jeanes:

Q: Do you believe that the test unit was hit by the removal machine --

A: Absolutely. We have the test unit. I'm sorry, I did it again. I didn't wait for you to finish.

Q: I was going to ask why? . . . .

* * * * *

A: And I'm not going to say. I can't tell you.

Court of Appeals Joint Appendix at 325-26.

b. Deposition of Walter Maxwell:

A: . . . . I do not believe we ever contacted the [test] equipment with the removal [machinery].

Q: Why do you say that, that you never contacted?

A: Because Mr. Jeanes has maintained that we did. There was a gouge on the test unit

when we removed it. I do not believe that the gouge in the equipment was consistent with the removal equipment.

* * * * *

A: Well, I told [Mr. Jeanes] that I did not believe that the removal equipment had contacted it, and that the scar or gouge on the test unit was not consistent with the damage that the test removal equipment would have done.

* * * * *

A: . . . . I expressed my belief that the marks on the test unit were inconsistent with what would have happened by direct contact from the removal equipment, and basically Mr. Jeanes said that he believed there was contact and that was it.

Court of Appeals Joint Appendix at 257, 259, 260.

2. <u>Excerpts from E-Systems March 31, 1993 Incident Report</u>

Memorandum from John W. Hale to J.W. Jeanes, 31 March 1993, re: Incident Report, Walter P. Maxwell:

As has been indicated to you verbally, it is the writer's opinion that further personnel action is unwarranted; hence, for the record, the writer

recommends that no further personnel action be taken. By being prohibited from participating in on-site activities at our remote site, and by being relieved from his L1211 Supervisor position, Walt has already 'taken the hit' for what was an accident under very poor working conditions.

For the record, you are very aware that Walt's accident in January is not the cause of the current activity . . .; this accident occurred during the planned recovery of a PCA/S-2 unit for failure analysis. Walt's accident did not cause the problems with the PCA/S-2, nor did the accident significantly obscure the failure mechanism. The PCA/S-2 problem existed before the accident. . . .

In an extenuating circumstance, Walt is, frankly speaking, in the 'retirement age category.' . . . Further personnel action may 'encourage' Walt to retire which, in the writer's opinion, is neither in the best interest of the CARDINAL O&M program, nor is it in the best interest of our Government Customer.

Court of Appeals Joint Appendix at 458.

3. Deposition excerpts relating to Stan Scalsky

a. **Deposition of Walter Maxwell:**

Q: So do you know whether Mr. Scalsky was considered for the site leader position?

A: I understand that he was considered.

Q: Do you know why he wasn't selected?

A: He told me that he was told that his age played a significant part in it.

* * * * *

Q: And in this conversation, just so I'm correct, Scalsky told you that he had been told that the reason he didn't get the site leader position was because of his age?

* * * * *

A: That's essentially how it went.

Q: Did Mr. Scalsky tell you who told him that?

A: Yes.

Q: Who?

A: He told me John Hale told him.

Court of Appeals Joint Appendix at 279-80.

b. **Deposition of Walter Maxwell:**

Q: Has Mr. Hale ever told you the reason why Scalsky wasn't chosen?

A: I asked John [Hale] after I talked to Stan [Scalsky] about it, and I'm trying to recall what his response was -- there was an avoidance-type response. He didn't come right out and say that he did it, but he said it was a possibility --

Q: Possibility that he said that?

A: That he had said that.

Court of Appeals Joint Appendix at 282.

c. **Deposition of John Hale:**

Q: In any of the discussions you had about selecting a new site leader, did Mr. Scalsky's age or health come up?

A: His health, no. There was a comment about, gee, it'd be nice to have someone as site leader with a little more longevity, you know, potential longevity with the company.

Q: Who made the comment about longevity?

A: Jeanes.

Court of Appeals Joint Appendix at 303.

4. Deposition exerpts relating to customer reaction

a. Deposition of Walter Maxwell:

Q: And what was the substance of that conversation [with the customer]?

A: Just discussed the accident and how we were proceeding, and he agreed that we were doing the right thing, to gather all the data that we could and proceed.

* * * * *

Q: During this conversation, did you think that the [customer] was upset about what had happened?

A: He did not appear to be.

Q: Did he say anything in the conversation to give you the impression that he wasn't upset?

A: He seemed to sympathize with us that we had the problem.

Court of Appeals Joint Appendix at 265-66.

b. Deposition of Walter Maxwell:

Q: . . . . Do you have any reason to believe that the actions you took at the site jeopardized [E-System's] future business with this same customer?

A: Since then we have signed a two-year contract to continue doing the work.

Court of Appeals Joint Appendix at 286.

5. <u>Deposition excerpts relating to E-Systems' replacement of Mr. Maxwell with Mr. Ascensio prior to the first asserted incident</u>

a. Deposition of Bobby G. Stilwell:

A: And we went out to hire a person to replace Walt. This was a couple of years ago, I guess. And we found this person that seemed like he would fit the job and would enhance E-Systems' eyes in view of our customer. And we hired him. And it takes about a year to six to eight months to get a clearance. And then we were going to have him work on the job for six or eight months to a year to learn what we were doing.

Court of Appeals Joint Appendix at 500.

A: And we actually made a change, or the decision was made. . . . [However,] the O&M customer we were dealing with . . . didn't want to do it. He thought it was a bad idea.

Court of Appeals Joint Appendix at 500.

b. Deposition of Frank Ascensio:

Q: Do you know why you were promoted to the position of acting engineering supervisor in January of '93?

A: Yes.

Q: Why is that?

A: Because the position had become vacant, and I was the best qualified candidate for the job. And in addition to that, a new management system was in the transition mode, being that for the past six months prior to January, maybe a little more, Walt, Walter Maxwell, and I had been transitioning in that I would eventually take over the position of engineering supervisor.

Court of Appeals Joint Appendix at 535.

6. <u>Deposition excerpts relating to the need for discipline of Mr. Maxwell</u>

Deposition of John Hale:

Q: 'Further personnel action is unwarranted.' Was that your opinion at the time?

A: That's my opinion, yes.

Q: Is that still your opinion?

A: Yeah, but it's past history

now.

Court of Appeals Joint Appendix at 306.

(2)

Supreme Court, U.S.
FILED
NOV 3 1995

No. 95-562

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WALTER P. MAXWELL,
Petitioner,

v.

E-SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL C. SKELLY *
WILLIAM P. FLANAGAN
AMY FOLSOM KEIT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8614
Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the unpublished per curiam decision of the court of appeals correctly applied well-settled summary judgment standards to the particular facts of this case in affirming the trial court's decision to enter judgment against the petitioner on his age discrimination claim.

STATEMENT REQUIRED BY RULE 29.6

The parent company of respondent E-Systems, Inc. is Raytheon Company. E-Systems, Inc. has no nonwholly-owned subsidiaries.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent E-Systems, Inc. ("E-Systems" or "the Company") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit.

This case involves nothing more than the straightforward application of this Court's settled summary judgment standards to the particular evidence adduced in the litigation. The court of appeals unanimously affirmed the district court's entry of summary judgment against petitioner Walter P. Maxwell ("Maxwell") on his age discrimination claim, because the evidence was insufficient to permit a reasonable factfinder to conclude either that E-Systems' asserted reason for demoting Maxwell—that he had negligently damaged property owned by a Federal Government customer—was untrue, or that the real

reason for the demotion was Maxwell's age. This determination has no significance beyond the confines of this specific litigation, a fact that the court of appeals recognized when it concluded there was no need even to publish its opinion.

The first "question" on which Maxwell seeks review—whether he established a *prima facie* case of age discrimination—is one that the court of appeals did not even reach. Even assuming that Maxwell could meet his initial burden of establishing a *prima facie* case, the Fourth Circuit held that he was unable to carry his ultimate burden of proving that but for his age, he would not have been demoted. This Court should not use its limited resources to consider a preliminary issue that was neither decided by the court of appeals nor necessary to its judgment.

Nor does the court of appeals' unpublished opinion—which, under the Fourth Circuit's own procedures, carries no precedential weight—present any question under this Court's decision in *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742 (1993). Indeed, the court of appeals specifically acknowledged the interpretation of *St. Mary's* that Maxwell advocates but held that he could not meet his own standard: Maxwell was not entitled to a trial because he failed to raise a genuine issue either as to the credibility of E-Systems' asserted reasons for his demotion, or as to whether the real reason for his demotion was his age.

The remaining issues that Maxwell raises, as he himself acknowledges, Pet. 13, 18, simply go to the sufficiency of the evidence and are not worthy of this Court's plenary consideration. Maxwell does not allege any conflict between the Fourth Circuit's decision and that of any other court of appeals; rather, he simply argues that the court of appeals' application of settled summary judgment principles to the particular evidence before it was incorrect. That is certainly not a basis for the exercise of this Court's certiorari jurisdiction, and, in all events, the court of appeals' decision is correct. The petition should be denied.

COUNTERSTATEMENT

E-Systems produces electronics systems and products. The E-Systems division in which Maxwell is employed as an engineer is primarily engaged in defense-related contract work for the Federal Government. Pet. App. 2A.[1] Prior to his demotion, Maxwell's principal duties were as "site leader" on the CARDINAL project, a classified project for the United States Government. In this role, he was responsible for operations at a site where Government-owned property was being tested. He also supervised four subordinates. *Id.*; J.A. 83, 89, 117.

In May 1992, Maxwell was in charge of retrieving a Government-owned "test unit" at the CARDINAL site. Although his supervisors warned him to use automated retrieval equipment to approach the test unit and then switch to hand tools to retrieve it, Maxwell used only the bulky automated equipment. The test unit was damaged and critical data lost. E-Systems determined that the incident, which greatly upset the Government customer, resulted directly from Maxwell's negligence. Accordingly, Maxwell was orally reprimanded and warned. Pet. App. 2A; J.A. 71, 99, 106.

A similar incident occurred in January 1993, when Maxwell was in charge of another retrieval effort. Although he was advised to use hand tools throughout the process, Maxwell again used automated equipment. While Maxwell was operating the automated equipment, he looked away from the co-worker who was giving hand signals to guide him. The automated equipment contacted the test unit, and the unit was damaged. Following this incident, E-Systems lost substantial business from the Government customer, and its credibility suffered. Pet. App. 2A-3A; J.A. 72-74, 158-159.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari. "J.A." refers to the Joint Appendix filed in the court of appeals.

Under the division's Procedures Manual—which provides that negligent damage to U.S. Government property is "of such a serious nature that a first occurrence will normally warrant discharge"—Maxwell could have been terminated outright. *Id.* at 169. Instead, after the second incident E-Systems decided to relieve him of his site-leader and supervisory responsibilities and demote him to the position of principal engineer with a salary reduction of about $10,000. The site-leader duties were reassigned to 53-year-old Larry Coughenour. Maxwell's supervisory duties were assumed by 32-year-old Frank Asencio (a principal engineer who had been hired in 1990 to add a further management layer to the CARDINAL staff) in addition to his own responsibilities. At the time of his demotion, Maxwell was 62 years old. Pet. App. 3A; J.A. 159.

Maxwell sued, alleging that he had been demoted because of his age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA").[2] After discovery, the United States District Court for the Eastern District of Virginia granted summary judgment to E-Systems on two alternative grounds.

First, applying this Court's familiar *McDonnell Douglas* burden-shifting scheme for employment discrimination cases,[3] the district court held that Maxwell was unable

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[2] The ADEA prohibits employers from discriminating on the basis of age against employees who are at least 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a).

[3] Under that scheme, the plaintiff has an initial burden of proving a *prima facie* case. The burden of production then shifts to the employer to state a legitimate, nondiscriminatory reason for the challenged employment decision. Once the employer does so, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). *Accord McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

to carry his initial burden of proving a *prima facie* case of age discrimination. To establish a *prima facie* case, Maxwell was required to show that "(1) he was protected by the ADEA; (2) he was demoted; (3) at the time he was demoted he was performing his job at a level that met his employer's legitimate expectations; and (4) 'following his demotion, he was replaced by an individual of comparable qualifications outside the protected class.'" Pet. App. 13A (quoting *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993)). The district court concluded that Maxwell could not satisfy the fourth element, because his duties were divided between two people, one of whom (Coughenour) was 53 years old, and thus well within the class of persons protected by the ADEA. *Id.*[4] Second, the district court held that, in any event, Maxwell was unable to prove by either direct or indirect evidence that E-Systems' asserted reason for his demotion —his negligent damaging of the test unit—was actually a pretext for age discrimination. *Id.* at 14A.[5]

The court of appeals affirmed without deciding the preliminary *prima facie* case issue, because it concluded that, in any event, Maxwell would not be able to carry his ultimate burden of proving discrimination at trial. *Id.* at 4A. The court of appeals observed that, as Maxwell had argued, he might survive summary judgment if "there was enough evidence to raise a genuine question regarding

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[4] The district court therefore did not need to decide whether Maxwell could satisfy the remaining elements of his *prima facie* case. We note that the district court's statement that the remaining elements were undisputed, Pet. App. 13A, is incorrect. E-Systems did not concede that Maxwell—after twice damaging property of a Federal Government customer—was meeting his employer's legitimate performance expectations. Defendant's Reply in Support of Motion for Summary Judgment at 13 n.9, J.A. 557.

[5] Maxwell's assertion to this Court that the district court judgment did not rest on alternative bases, Pet. 5-6 & n.3, is plainly incorrect, as the Fourth Circuit noted, Pet. App. 4A, and as Maxwell himself acknowledged in his initial brief to that court, *see* Brief of Appellant at 14-15.

whether the incidents" on which E-Systems relied in demoting him actually occurred as the Company claimed. *Id.* at 5A. The court of appeals held, however, that the record evidence was inadequate to "permit a reasonable person to conclude that the [test] units were not seriously damaged during the retrievals or that Maxwell was not responsible." *Id.* at 7A. "It is undisputed," the court of appeals emphasized, "that Maxwell was in charge" during the 1992 and 1993 incidents, "that he used automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident." *Id.* Maxwell's own deposition testimony "that the customer representative was not upset 'and appeared sympathetic' when informed of the January 1993 incident" did not, in the face of E-Systems' ample documentary and testimonial evidence to the contrary, suffice to create a genuine issue for trial. *Id.*

The court of appeals also held that Maxwell had failed to adduce sufficient evidence of discriminatory intent to warrant a trial. His sole evidence of discriminatory animus was his allegation that when the 53-year-old Coughenour was chosen to take over his site-leader duties instead of a 60-year-old named Stan Scalsky, a supervisor "commented on Scalsky's age and how it would be nice to have someone in the site-leader position with a little more longevity." *Id.* "Recognition of the effects of age and longevity of employees on long-range company planning is not discriminatory," the court of appeals observed, and "such evidence, without more, is an insufficient basis for relief in the face of proof of nondiscriminatory reasons for the employment action." *Id.* at 7A-8A.[6]

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[6] The court of appeals also affirmed the district court's entry of summary judgment for E-Systems on Maxwell's claim that he was demoted due to a disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Maxwell does not seek review of that ruling. Pet. 4A n.4.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO QUESTION CONCERNING THE ELEMENTS OF A *PRIMA FACIE* CASE OF AGE DISCRIMINATION, BECAUSE THAT QUESTION WAS NOT EVEN ADDRESSED BY THE COURT OF APPEALS AND WAS NOT NECESSARY TO ITS DECISION

Maxwell asks this Court to review the court of appeals' decision in order to resolve an alleged conflict concerning the elements of a *prima facie* case of age discrimination. That issue, however, is completely irrelevant to the judgment below. The court of appeals did not even reach the *prima facie* case question, and thus its decision is not in conflict with that of any other court on the matter. *See* S. Ct. Rule 10(a). Moreover, a hypothetical ruling favorable to Maxwell on this preliminary question would not have affected the outcome of the case.

Under this Court's precedents, establishing a *prima facie* case is only a first step toward proving employment discrimination under the *McDonnell Douglas* framework. Once the plaintiff makes a *prima facie* showing, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. When such a reason is given, the presumption of discrimination created by the *prima facie* showing "drops from the case," and the plaintiff bears the ultimate burden of proving not only that the employer's asserted justification is not credible, but also that the real reason for the challenged decision was impermissible discrimination. *St. Mary's*, 113 S. Ct. at 2747-48. *See also Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

The court of appeals found it unnecessary to decide whether Maxwell could establish a *prima facie* case, because it concluded that, in any event, he was unable either to cast doubt on E-Systems' stated reason for his demotion

or to prove that he was demoted because of his age. Pet. App. 6A-8A. Any question concerning the elements of the *prima facie* case was therefore wholly irrelevant to the judgment. Even if the court of appeals had reached the question and adopted the approach Maxwell advocates, its judgment against Maxwell would have been the same, because he could not carry his ultimate burden of proving unlawful discrimination.[7]

It is well established that certiorari review is unwarranted where, as here, the issue on which review is sought is irrelevant to the outcome of the case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 172-173 (7th ed. 1993) (citing authorities). Thus, even if the alleged conflict to which Maxwell points were otherwise ripe for this Court's consideration,[8] it would provide no basis for granting review in this case.

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[7] Maxwell contends that the *prima facie* case issue merits this Court's consideration because the district court reached it, and, he claims, rested its decision entirely on that basis. Pet. 5-6 & n.3. This Court, of course, does not sit to resolve alleged conflicts between a district court decision and decisions of courts of appeals. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 178-180 (7th ed. 1993). In any event, the district court did not base its decision solely on Maxwell's inability to prove a *prima facie* case. Like the court of appeals, the district court concluded that Maxwell would be unable to prove by either direct or indirect evidence that E-Systems' asserted reasons for his demotion were a pretext for age discrimination. Pet. App. 14A.

[8] Although it is not necessary to our argument, we note that any perceived "conflict" between other courts of appeals decisions on the appropriate formulation of the *prima facie* case will rarely, if ever, be dispositive. In the Fourth Circuit, a plaintiff who is unable to establish a *prima facie* case under the *McDonnell Douglas* formula is still permitted to prove discrimination by any direct or indirect evidence, using traditional proof methods. *See* Pet. App. 3A; *EEOC* v. *Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992); *Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982).

II. THIS CASE PRESENTS NO QUESTION UNDER *ST. MARY'S HONOR CENTER* v. *HICKS*, BECAUSE THE COURT OF APPEALS HELD THAT MAXWELL COULD NOT PREVAIL EVEN UNDER HIS OWN INTERPRETATION OF THAT CASE

In an effort to create a legal issue meriting review, Maxwell implies that there is some inconsistency between the court of appeals' decision and this Court's statement in *St. Mary's* that, in an employment discrimination case, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity), may, together with the elements of the prima facie case, suffice to show intentional discrimination." 113 S. Ct. at 2749. *See* Pet. 16. There is no inconsistency; indeed, the court of appeals followed the very interpretation of *St. Mary's* that Maxwell advocates.

Before the court of appeals, Maxwell argued that, under *St. Mary's*, he could survive summary judgment if, in addition to proving a *prima facie* case, he could raise a genuine dispute about the truthfulness of E-Systems' asserted reasons for demoting him—even absent any other evidence of discriminatory intent.[9] The court of appeals' analysis is consistent with Maxwell's interpretation. The court stated that, on the particular facts of this case, Maxwell could proceed to trial if he adduced sufficient evidence *either* (1) "to raise a genuine question regarding whether the [test unit] incidents occurred" as E-Systems claimed—in other words, if Maxwell could raise a genuine question as to whether the Company's proffered reason for its decision was worthy of credence; or (2) to show that the Company's "proffered reason, however facially valid, was merely a cover for discrimination." Pet. App. 5A. In this case, the court reasoned, evidence of either type could permit the factfinder to " 'infer the ultimate fact of discrimination.' " *Id.* (quoting *St. Mary's*, 113 S. Ct. at 2749)).

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[9] Brief of Appellant at 32-36.

The court of appeals concluded, however, that on the actual evidence before it, no reasonable factfinder could find for Maxwell under either test. *Id.* at 6A-7A. Because the court applied the very test that Maxwell urges, this case presents no "legal" question warranting this Court's review as to the meaning of *St. Mary's* or the nature of evidence that is required to prove discrimination. Under any available theory, the court of appeals determined that Maxwell's evidence was insufficient to warrant trial.

III. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION WAS CORRECTLY DECIDED AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS LITIGATION

Maxwell does not dispute the settled summary judgment standards that govern this case. Pet. App. 5A. There is no question that summary judgment should be denied only when the nonmoving party "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A mere scintilla of evidence in support of the nonmoving party's case will not suffice; rather, a genuine issue is raised only by evidence that would permit a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

The only issue that is actually presented in this case is whether the court of appeals correctly applied these well-settled standards to the particular facts adduced in the litigation. Pet. 12-18. Maxwell claims that the evidence created a genuine issue for trial; the court of appeals concluded that it did not. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

That nothing more is at issue in this case is confirmed by the court of appeals' determination that its per curiam opinion did not even warrant publication. The Fourth Circuit publishes an opinion if

> (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains an historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. [Fourth Circuit Internal Operating Procedure 36.4.]

Because the opinion below is unpublished, it has no precedential weight. *Id.* 36.6. The Fourth Circuit's disposition of the case, as that court recognized, is of moment only to the particular litigants before it. It presents no issues of broader significance justifying expenditure of this Court's limited resources on certiorari.

In any event, the court of appeals' decision is clearly correct. The court properly concluded that, on the record evidence, no reasonable jury could doubt that E-Systems demoted Maxwell—instead of terminating him, as company policy permitted—because of the test unit incidents. Pet. App. 6A-7A. There was no dispute that Maxwell alone "was in charge, that he used the automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident." *Id.* at 7A. Company documentary and testimonial evidence amply demonstrated that the demotion was primarily a customer relations issue. *Id.* at 6A.

Maxwell's effort to minimize the significance of the damage done to the test unit was based almost entirely on his own testimony—which was contrary to his admission that the 1993 incident was a "serious problem," J.A. 127—and on a report prepared by a low-level supervisor,

John Hale, whose opinion that Maxwell should not be relieved of his site-leader and supervisory responsibilities was not shared by more senior management employees who were responsible for the demotion decision. J.A. 59-61.[10] No other employee was similarly disciplined, because no other employee was twice in charge of operations that similarly damaged Government property. That Maxwell claimed to have spoken to a customer representative who was not visibly upset, and that the particular contract may have been extended, did not contradict the Company's evidence that the customer was astounded that the second incident had occurred and that the Company lost business and prestige as a result. J.A. 72-74, 158-159.

The court of appeals also properly concluded that Maxwell's proffered evidence of discriminatory animus was inadequate to warrant trial. Pet. App. 7A-8A. That evidence consisted of hearsay testimony regarding the decision to appoint 53-year-old Coughenour, rather than 60-year-old Scalsky, to the site-leader position. Even assuming that the hearsay would have been admissible at trial, the alleged comment that "it would be nice to have someone in the site-leader position with a little more longevity," *id.* at 7A, which was made in the context of long-range company planning and was not even about Maxwell, was plainly inadequate in the face of E-System's considerable evidence to the contrary to prove that Maxwell was demoted not because of the test unit incidents, but because of his age.[11]

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[10] Maxwell mischaracterizes Hale's report. Although Hale stated his opinion that the 1993 incident did not "significantly obscure" the test unit's failure mechanism and was not the cause of certain problems being experienced with the unit, his report nowhere states that the damage caused by the incident was only "minor" or "[in]substantial." Pet. App. 18A-19A.

[11] Hale's statement in his report that Maxwell should not be disciplined because he was "retirement age," Pet. 17, is hardly persuasive evidence that the managers who rejected Hale's recommendation intentionally discriminated against Maxwell on the basis of his age.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

PAUL C. SKELLY *
WILLIAM P. FLANAGAN
AMY FOLSOM KETT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8614
Counsel for Respondent

* Counsel of Record